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IN THE

Supreme Court of the United States

October Term, 1965
No. 832

WORLD AIRWAYS, INC.,

Petitioner,

vs.

NATIONAL MEDIATION BOARD: FRANCIS A. O'NEIL, JR., individually and as Chairman of the National Mediation Board; LEVERETT EDWARDS, individually and as member of The National Mediation Board; and HOWARD G. GAMSER, individually and as member of The National Mediation Board,

Respondents.

WORLD AIRWAYS, INC., EDWARD J. DALY and PETER T. CRAVEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

GIBSON, DUNN & CRUTCHER,
JEROME C. BYRNE,
JAN VETTER,
WESLEY G. HOWELL, JR.,
9601 Wilshire Boulevard,
Beverly Hills, Calif. 90210,
Attorneys for Petitioners, World Airways, Inc., Edward J. Daly and Peter T. Craven.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of February 28, 1966 denying the Petition for Writ of Certiorari and that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Ninth Circuit in the above-entitled cases as prayed for in the Petition filed December 17, 1965.

Reasons for Granting Rehearing and Issuing the Writ.

On February 28, 1966 the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was denied by this Court. Since no reasons were assigned by the Court for the denial of certiorari, it is not clear which of the arguments presented by the Solicitor General was thought to be determinative. The first ground urged by the Solicitor General in opposition to the petition for a writ of certiorari was that the Petitioners' argument to the effect that the Board had not properly performed its investigatory duty had not been properly presented in the District Court or the Court of Appeals. (Memo. for Resp. pp. 3-4.) The failure to more clearly enunciate the argument in the District Court was due to the fact that the principles upon which that argument is based was not clearly set forth until the decision of the Supreme Court of the United States in *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees* (1965), 380 U.S. 650. The principles upon which the argument is based were clearly set forth in the argument in the Court of Appeals, but the Court of Appeals apparently considered itself limited by the complaint even though this Court did not so consider itself limited in judging a similar complaint in the *Railway Clerks* case, *supra*. If the denial of the petition for the writ of certiorari was because the issues were thought to have not been properly presented in the lower courts, the most appropriate disposition of

the case would be a remand, granting leave to amend in order to allow the questions to be properly presented. *See:* Rule 15 of the Federal Rules of Civil Procedure.

The argument principally relied on by the Government is that the questions presented by this dispute are not ripe for determination at this time. (Memo. of Resp. pp. 4-6.) It is asserted that the National Mediation Board has not completed its investigation and that no determination has yet been made of the appropriate class or craft. Therefore, according to the Government, any inquiry into the nature of the investigation made in order to determine the appropriate class or craft is premature. However, the Government, itself, recognizes that the only reason the Board needs the names and addresses of the employees is to make a final comparison with the signatures on the authorization cards. (Memo. of Resp. p. 4.) This final checking is to determine whether the rquired percentage of employees *in an appropriate class* has requested representation. Thus the request to examine the Petitioner's books necessarily presumes a determination as to the appropriate class or craft. A review of the record in the present case makes it abundantly clear that the Board has made a determination as to the appropriate class without conducting any investigation, and that all that remains to be done is the ordering of an election. Since it is clear that the Board has made such a determination, questions as to whether that determination was made in the light of an appropriate investigation should be considered by the Court at this time.

That the Board's intention is to immediately conduct an election without additional investigation except for the final checking of the names, is amply demonstrated by the Board's failure to agree to the suggestion made by counsel for the Petitioner on January 1, 1964. [R. p. 85.][1] At that time, the Petitioners offered to provide access to the books and records requested by the Board if, in return, the Board would agree to defer any mailing of ballots or other election procedures until 20 days after the announcement of its decision concerning the appropriate class or craft. The 20 day period was requested in order to allow the carrier the minimum amount of time necessary to apply for relief from the courts in the event that the Board's decision was not supported by the facts as they were unveiled in an appropriate investigation. It is apparent that the Board considers the checking of the names the final step before ordering an election and that a final determination as to the appropriate craft or class is made before such a check. In addition to demonstrating that the Board does not intend to conduct any further investigation, the offer by the Petitioners also demonstrates their good faith and willingness to comply with any reasonable request made by the Board as long as the Petitioner is provided with an opportunity to question the Board's procedures.

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[1]Citation is to the record in World Airways, Inc, v. National Mediation Board, *et al.*

Conclusion.

In summary, the questions presented are not in any respect premature since it is abundantly clear that the Board has made a craft or class determination upon which it intends to act. Whether that determination was made without an appropriate investigation is a question which should properly be considered by the Court at this time. Failure to consider the question now will result in needless litigation after the Board orders an election.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
JEROME C. BYRNE,
JAN VETTER,
WESLEY G. HOWELL, JR.,
Attorneys for Petitioners, World Airways, Inc., Edward J. Daly and Peter T. Craven.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JEROME C. BYRNE